A

BATO BAGI & ORS

v.

GOVERNMENT OF THE STATE OF SARAWAK

B

COURT OF APPEAL, PUTRAJAYA
ZAINUN ALI JCA
SULAIMAN DAUD JCA
SYED AHMAD HELMY JCA
[CIVIL APPEAL NO: Q-01-75-2008]

C

18 APRIL 2011

CIVIL PROCEDURE: *Action - Disposal of action without trial - Appeal against - Whether questions of law suitable for determination under O. 14A Rules of the High Court 1980 - Whether plaintiffs afforded opportunity to be heard - Whether learned judge acted contrary to O. 14A r. 1(3) Rules of the High Court 1980*

D

This was an appeal against the decision of the High Court judge giving judgment for the defendant, the State Government of Sarawak (the respondent herein) on their application for determination of points of law pursuant to O. 14A of the Rules of the High Court 1980 (O. 14A). The application arose from the plaintiffs' (the appellants herein) amended statement of claim in which they challenged, among others, the validity of the extinguishment by the defendant of their native customary rights over land along Batang Balui, in Belaga District, Kapit Division, Sarawak ("the said land"). The defendant had acted through the Minister of Resource Planning Sarawak ('the Minister') and issued a direction pursuant to s. 5(3) and (4) of the Sarawak Land Code ('the direction'). The plaintiffs argued that (a) the learned judge had erred in fact and in law in holding that the questions or issues of law as formulated by the defendant were suitable for determination as a preliminary issue pursuant to O. 14A and (b) that the learned judge had acted contrary to O. 14A r. 1(3) in making his determination on the issues raised without affording the plaintiffs an opportunity to be heard.

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Held (dismissing the appeal)
Per Sulaiman Daud JCA delivering the judgment of the court:

I

(1) An issue is only suitable for determination under O. 14A if the points of law to be determined thereunder have been stated in clear and precise terms, and the facts disclosed by the

pleadings and affidavit evidence are sufficient for the court to make such determination which would be final as to the entire cause or matter. The facts involved in the determination of the said issues are not in dispute and would not require further adjudication or resolution. The present case was suitable for determination under O. 14A without a full trial of the action. The issue as to the plaintiffs' native customary rights over the said land was no longer a live issue as the plaintiffs themselves asserted that they had already acquired such rights. By reason thereof, the validity of the Direction could be determined on the premise that the plaintiffs had acquired such rights without the necessity to make any finding of facts on the matter. (paras 17 & 19)

(2) The issuance of the Direction was not disputed. Therefore, the issue as to whether the extinguishment of such customary rights was lawful or otherwise could be determined merely based on the affidavit evidence and the pleadings which had precisely stated the basic facts which formed the basis of the plaintiffs' claim. The challenge to the constitutionality of the empowering provisions in ss. 5(3) and (4) of the Land Code could be determined by reference to the relevant written laws, including both the State and Federal Constitutions, and the numerous authorities on this matter without the need for further evidence. (para 20)

(3) The plaintiffs were afforded an opportunity to be heard on the substantive issues at the hearing before the learned judge. Learned counsel who appeared for the plaintiff were senior and experienced advocates who elected to respond orally to the various substantive issues addressed by the defendant's learned counsel in support of the application and the legal issues raised therein. The plaintiffs' learned counsel could not now be heard to say that the learned judge did not grant them or the plaintiffs the opportunity to be heard at the hearing of the matter before him. (para 25)

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan terhadap keputusan Hakim Mahkamah Tinggi memberikan penghakiman kepada pihak defendan, Kerajaan Negeri Sarawak (responden) atas permohonannya untuk menentukan persoalan-persoalan undang-undang di bawah A. 14A Kaedah-kaedah Mahkamah Tinggi 1980 (A. 14A). Permohonan timbul dari pernyataan tuntutan yang dipinda plaintif-plaintif (perayu-perayu) di

A mana mereka telah mencabar, antara lain, kesahihan penghapusan oleh defendan hak adat anak-anak negeri mereka ke atas tanah sepanjang Batang Balui, di Belaga District, Kapit Division, Sarawak ('tanah tersebut'). Defendan, yang bertindak melalui Menteri Perancangan Sumber Sarawak ('Menteri') telah B mengeluarkan arahan di bawah s. 5(3) dan (4) Kanun Tanah Sarawak ('arahan itu'). Plaintif-plaintif berhujah bahawa (a) yang arif hakim telah membuat kesalahan dari segi fakta dan undang-undang dalam memutuskan bahawa persoalan-persoalan atau isu-isu undang-undang yang dirumuskan oleh defendan bersesuaian C untuk ditentukan sebagai isu awalan di bawah A. 14A dan (b) bahawa yang arif hakim telah bertindak bertentangan dengan A. 14A k. 1(3) dalam membuat penentuan mengenai isu-isu yang dibangkitkan tanpa memberi plaintif-plaintif peluang untuk didengar.

D **Diputuskan (menolak rayuan)**

Oleh Sulaiman Daud HMR menyampaikan penghakiman mahkamah:

(1) Sesuatu isu hanya bersesuaian untuk ditentukan di bawah A. 14A jika persoalan-persoalan undang-undang yang E memerlukan penentuan itu telah dinyatakan dengan terma-terma yang jelas dan tepat, dan fakta-fakta yang didedahkan oleh pliding dan keterangan afidavit adalah memadai untuk mahkamah membuat keputusan yang muktamad mengenai keseluruhan kausa atau halperkara. Fakta-fakta terlibat di F dalam penentuan isu-isu tersebut tidak dalam pertikaian dan selanjutnya tidak memerlukan penghakiman atau resolusi. Kes ini adalah bersesuaian untuk penentuan di bawah A. 14A tanpa perbicaraan penuh tindakan. Isu mengenai hak adat anak-anak negeri plaintif-plaintif ke atas tanah tersebut bukan G lagi isu langsung kerana plaintif-plaintif sendiri telah menyatakan bahawa mereka telah pun mendapat hak-hak sedemikian. Dengan alasan itu, kesahihan arahan boleh ditentukan pada premis yang plaintif-plaintif telah mendapat hak-hak sedemikian tanpa keperluan membuat apa-apa H penemuan-penemuan fakta-fakta mengenai perkara itu.

(2) Pengeluaran arahan tidak dipertikaikan. Oleh itu, isu sama ada penghapusan hak adat anak-anak negeri sedemikian adalah mengikut undang-undang atau sebaliknya boleh ditentukan I hanya berdasarkan keterangan afidavit dan pliding-pliding yang telah dengan tepatnya menyatakan fakta-fakta asas yang merupakan dasar permohonan plaintif-plaintif. Cabaran

perlembagaan peruntukan-peruntukan yang memberi kuasa di dalam ss. 5(3) dan (4) Kanun Tanah boleh ditentukan melalui rujukan kepada undang-undang bertulis yang relevan, termasuk Negeri dan Perlembagaan-Perlembagaan Persekutuan, dan berbagai-bagai otoriti-otoriti mengenai perkara ini tanpa memerlukan keterangan lanjut.

(3) Plaintif-plaintif telah diberi peluang untuk didengar pada isu-isu substantif di pembicaraan di hadapan yang arif hakim. Peguam bijaksana yang mewakili plaintif adalah senior dan peguambela berpengelaman yang memilih untuk menjawab secara lisan beberapa isu-isu substantif yang dikemukakan oleh peguam bijaksana defendan dalam menyokong permohonan dan isu-isu guaman yang timbul. Peguam bijaksana plaintif-plaintif tidak boleh pada masa ini menyatakan bahawa yang arif hakim tidak memberi mereka atau plaintif-plaintif peluang untuk didengar di pembicaraan mengenai perkara di hadapannya.

Case(s) referred to:

Allen v. Gulf Oil Refining Ltd [1980] QB 156 ***(refd)***

BPI International Finance Ltd v. Tengku Abdullah Ibni Sultan Abu Bakar [2009] 4 CLJ 599 CA ***(refd)***

Law Hock Key & Anor v. Yap Meng Kan & Ors [2008] 3 CLJ 470 CA ***(refd)***

Petroleum Nasional Bhd v. Kerajaan Negeri Terengganu & Another Appeal [2003] 4 CLJ 337 CA ***(refd)***

Seloga Jaya Sdn Bhd v. UEM Genisys Sdn Bhd [2008] 2 CLJ 686 CA ***(refd)***

State Government of Perak v. Muniandy [1985] 1 LNS 117 SC ***(refd)***

TSC Europe (UK) Ltd v. Massey [1999] IRLR 22 ***(refd)***

Legislation referred to:

Constitution of the State of Sarawak, art. 39

Federal Constitution, arts. 5(1), 8(3), 13, 153

Rules of the High Court 1980, O. 14A r. 1(3)

Sarawak Land Code, s. 5(3), (4)

For the plaintiffs - Raja Aziz Addruse; M/s Meena Raman & Partners Paul Raja; M/s Paul Raja & Co

For the defendant - Datuk Fong Joo Chung (Joseph Chioh Hock Chua with him); State AG's Chambers

[Appeal from High Court, Kuching; Civil Suit No: 22-74-2000-II]

[Editor's note: For the High Court judgment, please see Bato Bagi & Ors v. Government Of The State Of Sarawak [2008] 6 CLJ 867.]

Reported by Suhainah Wahiduddin

A

JUDGMENT

Sulaiman Daud JCA:

[1] This is an appeal against the decision of the learned High Court judge made on 28 April 2008, whereby his lordship gave judgment for the defendant, the State Government of Sarawak, (the respondent in this appeal) on their application for determination of points of law pursuant to O. 14A of the Rules of the High Court 1980 (O. 14A). The application arose from the plaintiffs (the appellants in this appeal) amended statement of claim in which they challenged, among others, the validity of the extinguishment by the defendant of their native customary rights over land along Batang Balui, in Belaga District, Kapit Division, Sarawak ("the said land").

[2] After hearing submission of counsel for both parties, we dismissed the plaintiffs' appeal with costs. We now give our reasons.

The Background

[3] This action is brought by the plaintiffs on behalf of themselves and the residents of the long houses which they represent. The facts as set out in the statement of claim and the affidavit evidence can be briefly stated as follows.

[4] The plaintiffs are members of the native Dayak communities, having native customary rights over the said land. On 17 June 1997, the defendant, acting through the Minister of Resource Planning, Sarawak ("the Minister"), issued a direction pursuant to s. 5(3) and (4) of the Sarawak Land Code ("the Land Code") cited as the Land (Extinguishment of Native Customary Rights) (Bakun Flooded Area II) (No. 26) Direction, 1997 ("the direction"). On the coming into force of the direction on 23 June 1997, all native customary rights that may be claimed or have subsisted over the land described in the schedule thereto, which includes the said land, shall be extinguished and the same shall revert to the Government of Sarawak. Paragraph 3 of the direction requires any person who desires to make any claim for compensation as a consequence of such extinguishment to submit his claim to the Superintendent, Land and Survey Department concerned.

[5] All claimants who had submitted their claims and furnished proof that they had native customary rights over the said land, including the plaintiffs herein (except the sixth plaintiff), were awarded compensation pursuant to s. 5(3) of the Land Code.

[6] The plaintiffs averred that the extinguishment of their native customary rights over the said land pursuant to the direction was void for the various reasons as set out in their statement of claim. They claimed for a declaration that (i) ss. 5(3) and (4) of the Land Code are void; and (ii) the extinguishment of their native customary rights pursuant to the direction is likewise void. They also prayed for an order that the defendant and their servants and agents vacate the said land. Alternatively, they claimed for a declaration that each of them is entitled to adequate compensation in respect of their respective rights over the said land.

[7] By summons in chambers dated 2 October 2007, the defendant applied to the High Court for the determination of points of law pursuant to O. 14A, which are framed as follows:

(a) Whether ss. 5(3) and (4) of the Sarawak Land Code infringe or violate arts. 5(1), 8, 13 and 153 of the Federal Constitution, and art. 39 of the State Constitution of Sarawak, and therefore void.

(b) Whether having regard to the law, facts and circumstances as pleaded by the parties, the plaintiffs are entitled to a declaration that the Land (Extinguishment of Native Customary Rights) (Bakun Flooded Area II) (No. 26) Direction 1997, (Sarawak Government Gazette No. 1901) which came into force on 23 June 1997 is void.

(c) Whether the plaintiffs are entitled to an order that the government and/or their servants vacate the land claimed by the plaintiffs herein; and

(d) Having regard to the decision on issues (a), (b) and (c) above, whether the plaintiffs are entitled to the alternative remedies sought herein pertaining to the adequacy of damages for extinguishment of their native customary rights over the affected land as described in the amended statement of claim.

[8] Having considered the pleadings of both parties and the applicable legal principle, the learned judge concluded that the issues so raised were appropriate to be determined under O. 14A without a full trial of the action.

[9] With regard to the points of law raised in the O. 14A application, the learned judge held that the said ss. 5(3) and (4) of the Land Code were not unconstitutional and void, as a violation of arts. 5(1), 8(3) and 13 of the Federal Constitution, or alternatively, as being against art. 39 of the State Constitution of Sarawak and art. 153 of the Federal Constitution. His finding can be summarized as follows:

(a) that the said ss. 5(3) and (4) are in conformity with art. 5(1) of Federal Constitution as it expressly provide for the power of the Minister to extinguish native customary rights over land in the manner set out therein in clear and unambiguous terms;

(b) that the said sections are not discriminatory within the meaning of art. 8 of the Federal Constitution by reason only that the Land Code provides for different procedures for the acquisition of titled land and for the extinguishment of native customary rights over land as the holder of titled land and the holder of such rights are not of the same class or category in so far as it relates to their respective rights and interests in land under the Land Code;

(c) there is also no infringement or violation of art. 13 of the Federal Constitution as the said sections expressly provide for the procedure for claim and payment of compensation in respect of the rights so extinguished, including the right to refer the matter to the Superintendent where the amount or apportionment of compensation is inadequate;

(d) that art. 39 of the State Constitution and art. 153 of the Federal Constitution deal with the protection and the special position and prerogatives of the natives in respect of the matters set out therein, and is not in any way related to the rights of the natives on their land.

[10] On the issue of procedural fairness, the learned judge was of the view that the Minister in issuing the direction had followed and complied with the procedures stipulated in the said ss. 5(3) and 5(4). The direction was published in the gazette and exhibited

at the district office for the area where the land is situated, with a notice requiring any person effected thereby to submit their claim for compensation in such manner and at such place stipulated therein. Further, the learned judge also expressed the view that there was no duty imposed upon the Minister under the said sections to grant the holder of native customary rights the right to be heard before issuing the decision for extinguishment.

[11] We entirely agree with the finding of the learned judge as aforesaid. However, we find it unnecessary to delve further into the finding of the learned judge on its merit. His finding on the constitutional issues was neither raised as a ground in the memorandum of appeal nor canvassed and argued before us. Likewise, although the issue of procedural fairness was raised in the memorandum of appeal it was never argued on its merit by plaintiffs' learned counsel at the hearing of this appeal.

The Appeal

[12] Learned counsel for the plaintiffs in the appeal before this court only focused his arguments essentially on the following grounds:

(a) that the learned judge had erred in fact and in law in holding that the questions or issues of law as formulated by the defendant were suitable for determination as a preliminary issues pursuant to O 14A; and

(b) that the learned judge had acted contrary to O. 14A r. 1(3) in making his determination on the issues raised without affording the plaintiffs an opportunity to be heard.

Whether Issues Appropriate For O. 14A Determination

[13] The learned judge allowed the defendant's application for the proposed questions of law to be determined under O. 14A on two main grounds. First, his lordship found the material facts required for such determination were sufficiently pleaded in the statement of claim. Secondly, it was apparent to him that there was no controversial or disputed facts that would require further oral evidence at a trial since the plaintiffs have amended their endorsement of claim by deleting the prayer for a declaration that they have native customary rights over the said land.

[14] Learned counsel for the plaintiffs mounted his attack on the finding of the learned judge on two main grounds. First, he contended that there was no basis in law for the learned judge to hold that the plaintiffs have, by amending their statement of claim, abandoned the issue of their native customary rights over the said land. Secondly, learned counsel submitted even if the plaintiffs' native customary rights was no longer in dispute, it was apparent from the pleadings that the claim for native customary rights was not the only dominant issue to be determined by the court. He pointed out the plaintiffs' pleaded case also touched on the constitutionality of ss. 5(3) and (4) of the Land Code with reference to arts. 5, 8, 13 and 153 of the Federal Constitution and art. 39 of the State Constitution of Sarawak, as well as the issues relating to procedural fairness and breach of natural justice in the exercise of the powers under the said sections. Learned counsel submitted that these issues not only require oral evidence to be adduced for their determination, but also require complex argument which was unsuitable for determination under O. 14A.

[15] For the purpose of determining the appropriateness or otherwise of the O. 14A application, we find it necessary at this stage to have regard to the relevant part of the plaintiffs' pleadings. It is trite law that parties are bound by their own pleadings. (see *BPI International Finance Ltd v. Tengku Abdullah Ibni Sultan Abu Bakar* [2009] 4 CLJ 599, and *State Government of Perak v. Muniandy* [1985] 1 LNS 117).

[16] From para. 1b of the statement of claim it is obvious that the plaintiffs' claim in this action is on the premise that they have native customary rights over the said land. The assertion in para. 2a thereof that the Minister had issued the direction in question which have the effect of extinguishing all customary rights in the scheduled area is not disputed. The issue of procedural fairness is raised in para. 4 where it was asserted that the failure to accord the same violate art. 5(1) of the Federal Constitution. The challenge to the constitutionality of ss. 5(3) and (4) of the Land Code with reference to arts. 5(1), 13, 8 and 153 of the Federal Constitution are pleaded in paras. 5, 7, 11 and 16 of the statement of claim respectively, and the challenge with reference to art. 39 of the State Constitution is set out in para. 15 therein.

[17] It is well settled that an issue is only suitable for determination under O. 14A if the points of law to be determined thereunder have been stated in clear and precise terms, and the facts disclosed by the pleadings and affidavit evidence are sufficient for the court to make such determination which would be final as to the entire cause or matter. (see *Allen v. Gulf Oil Refining Ltd* [1980] QB 156, and *Seloga Jaya Sdn Bhd v. UEM Genisys Sdn Bhd* [2008] 2 CLJ 686). The facts involved in the determination of the said issues are not in dispute and would not require further adjudication or resolution by the court. (see *Law Hock Key & Anor v. Yap Meng Kan & Ors* [2008] 3 CLJ 470).

[18] On the contrary, an issue is not suitable for determination under O. 14A if it is sensitive to the facts and the issues of fact are interwoven with the legal issues raised. (see *TSC Europe (UK) Ltd v. Massey* [1999] IRLR 22) Even if the case appears to be or is complicated it does not mean that the court must shun away from considering the applicability of O. 14A in relation to the question of law posed. (see *Petroleum Nasional Bhd v. Kerajaan Negeri Terengganu & Another Appeal* [2003] 4 CLJ 337.).

[19] Having considered the applicable legal principles and the pleadings as set out above, we agree with the finding of the learned judge that the present case is suitable for determination under O. 14A without a full trial of the action. We are also in agreement with the learned judge that the issue as to the plaintiffs' native customary rights over the said land is no longer a live issue as the plaintiffs themselves asserted that they have already acquired such rights. By reason thereof, the validity of the direction can be determined on the premise that the plaintiffs have acquired such rights without the necessity to make any finding of facts on the matter.

[20] Further, the issuance of the direction is also not disputed. Therefore, in our view, the issue as to whether the extinguishment of such customary rights is lawful or otherwise can be determined merely based on the affidavit evidence and the pleadings which we found to have precisely stated the basic facts which formed the basis of the plaintiffs' claim. Likewise, we are also of the view that the challenge to the constitutionality of the empowering provisions in ss. 5(3) and (4) of the Land Code can be determined by reference to the relevant written laws, including both the State and Federal Constitutions, and the numerous authorities on this matter without the need for further evidence.

Whether Plaintiffs Had An Opportunity To Be Heard

[21] Learned counsel for the plaintiffs contended that the questions being considered at the hearing of the O. 14A application was whether the issues framed by the defendant were appropriate to be tried as preliminary issues or otherwise. According to learned counsel the authorities cited and referred to at that hearing were for the purpose of determining the appropriateness or otherwise of such an application, and not for the purpose of arguing the substantive issues themselves. Further, it was pointed out no argument was advanced in depth on the various constitutional issues raised in the pleadings. By reason thereof, learned counsel concluded that the learned judge had acted contrary to O. 14A r. 1(3) of the RHC in making his determination on the substantive issues without affording the appellant an opportunity to be heard on them.

[22] Learned counsel for the defendant submitted that the defendant's written submission and bundle of authorities, which dealt comprehensively with all issues of law posed for the court's determination, were handed to the plaintiffs' learned counsel at the hearing of the matter in the court below. At that hearing, the appellants' learned counsel proceeded to reply orally on all the issues so raised. Further, learned counsel pointed out that the plaintiffs was represented by a very senior and experienced advocate who would certainly had asked for an adjournment or leave of the court to provide more comprehensive reply, if necessary. Hence, he submitted, it was not fair for learned counsel to raise this issue in the present appeal.

[23] The chronology of events clearly showed that the defendant's O. 14A application was filed on 2 October 2007 and the sealed copy was served on the plaintiffs' advocate on 17 October 2007, followed by exchange of affidavits between the parties. On 24 October 2007, the learned judge fixed the date for hearing of the O. 14A application on 12 November 2007. On that date the learned judge adjourned the hearing of the application to 9 January 2008 in the present of counsel for both parties but the application was not heard until 5 March 2008.

[24] At the hearing of the O. 14A application on 5 March 2008, the plaintiffs were represented by three learned counsel. The defendant's learned counsel then submitted his written submission and proceeded to address the court on the merit of the O. 14A application and the substantive issues on the points of law raised

therein. From the notes of proceedings it is also obvious that learned counsel for the plaintiffs had also prepared his written submission and responded orally to the substantive issues on the points of law framed for determination of the court in the O. 14A application. The learned judge delivered his ruling on the appropriateness of the O. 14A application and on the substantive issues raised therein on 28 April 2008.

[25] With respect we were unable to agree with learned counsel for the plaintiffs that they were not afforded an opportunity to be heard on the substantive issues at the hearing before the learned judge. As correctly pointed out by learned counsel for the defendant, learned counsel who appeared for the plaintiff are senior and experienced advocates who elected to respond orally to the various substantive issues addressed by the defendant's learned counsel in support of the application and the legal issues raised therein. In our view, the plaintiffs' learned counsel cannot now be heard to say that the learned judge did not grant them or the plaintiffs the opportunity to be heard at the hearing of the matter before him.

[26] Accordingly, we unanimously dismissed the appeal with costs to be taxed. Deposit towards account of taxed costs.